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Supreme Court of the United States

OCTOBER TERM, 1951

No. 408

SAFEWAY STORES, INCORPORATED, *Petitioner*,

v.

MICHAEL V. DISALLE, Price Director, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS AND BRIEF IN SUPPORT THEREOF.

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PETITION.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Safeway Stores, Incorporated, respectfully petitions for a writ of certiorari to the United States Emergency Court of Appeals to review a decree of said court entered on October 9, 1951 (R. 53), dismissing a petition filed by petitioner in an action in the nature of mandamus requesting said court to issue an order to respondent commanding him forthwith to grant or deny certain applications for adjustment filed by petitioner pursuant to the provisions of Sec-

tion 402(d)(4) of the Defense Production Act of 1950, as amended, 65 Stat. ch. 275, Public Law 96, 82nd Congress, 50 USCA Appendix Section 2071 et seq., and to issue procedural regulations providing administrative machinery for the processing of applications for adjustment that might be filed in the future.

The order of the United States Emergency Court of Appeals (R. 53) is as yet unreported.

A.

STATEMENT OF MATTER INVOLVED.

Petitioner is a corporation organized and existing under the laws of the State of Maryland, with its principal office in Oakland, California. It operates 1,948 retail food stores in twenty-three states and the District of Columbia and is subject to the provisions of the Act under the terms of which respondent has promulgated numerous ceiling price regulations and amendments thereto fixing ceiling prices on items sold by petitioner in its various stores. Among said regulations is Ceiling Price Regulation 15, originally issued effective April 5, 1951, (32 ACFR, Chapter III, 16 FR 2735).

On July 31, 1951, Section 402(d) of the Defense Production Act of 1950 was amended, inter alia, by the inclusion of an additional paragraph, Section 402(d)(4), reading as follows:

> "(4) After the enactment of this paragraph no ceiling price on any material (other than an agricultural commodity) or on any service shall become effective which is below the lower of (A) the price prevailing just before the date of issuance of the regulation or order establishing such ceiling price, or (B) the price prevailing during the period January 25, 1951, to February 24, 1951, inclusive. Nothing in this paragraph shall prohibit the establishment or maintenance of a ceiling price with respect to any material (other than an agricultural commodity) or service which (1) is

based upon the highest price between January 1, 1950, and June 24, 1950, inclusive, if such ceiling price reflects adjustments for increases or decreases in costs occurring subsequent to the date on which such highest price was received and prior to July 26, 1951, or (2) is established under a regulation issued prior to the enactment of this paragraph. Upon application and a proper showing of his prices and costs by any person subject to a ceiling price, the President shall adjust such ceiling price in the manner prescribed in clause (1) of the preceding sentence. For the purposes of this paragraph the term 'costs' includes material, indirect and direct labor, factory, selling, advertising, office, and all other production, distribution, transportation and administration costs, except such as the President may determine to be unreasonable and excessive."

Pursuant to the provisions of the foregoing section of the law, petitioner on August 24, 1951, filed with respondent an application for adjustments of its retail ceiling prices on various items covered by Ceiling Price Regulation 15 in forty of its stores located in Seattle, Washington (R. 7). On September 7, 1951, petitioner filed an amendment to its application. On various dates between August 28, 1951, and September 13, 1951, petitioner filed with respondent twenty-one additional applications for adjustments in ceiling prices on grocery items in approximately 1,014 of its retail food stores located in the states of Arizona, Arkansas, California, Colorado, Idaho, Iowa, Kansas, Maryland, Missouri, Montana, Nebraska, New Jersey, New York, Oklahoma, Oregon, South Dakota, Texas, Utah, Virginia, Washington and Wyoming, and in the District of Columbia. Each of said applications was verified by an officer of petitioner and contained data from petitioner's business records in support of the adjustment requested.

Following the amendment of the Act, respondent, to whom the President had delegated the powers of administration, took no steps towards the administration of the new section other than to appear before Committees of the

Congress and to request its repeal on the ground that it was incapable of administration. No regulations were issued informing persons subject to the law of the method or manner by which they should proceed in order to obtain consideration of applications filed pursuant to the amended Section 402(d)(4).

On September 17, 1951, petitioner filed in the United States Emergency Court of Appeals an action in the nature of mandamus requesting that court to issue an order directed to respondent herein commanding him forthwith to grant or deny the applications for adjustments hereinbefore mentioned and to issue procedural regulations providing administrative machinery for the processing of applications for adjustment which might be filed in the future, or for such other relief as justice might require (R. 1).

On October 2, 1951, respondent herein filed objections to the petition of petitioner and asserted, inter alia, that the petition was not within the court's jurisdiction and that it failed to state a claim upon which relief could be granted (R. 26). Respondent contended that petitioner had failed to assert rights properly enforceable by a mandatory writ; that petitioner had asserted no rights protected by Section 104(e) (Section 402(d)(4) of the Act as amended); that respondent is under no duty whatsoever to issue procedural regulations providing for administrative machinery for the expeditious processing of similar applications for adjustment; and that the petition, even if Section 402(d)(4) were applicable, does not make out a case for mandatory action.

On the same day that respondent filed his objections in the court, but without informing the court, respondent addressed a letter to the attorney for petitioner denying its applications for adjustment, and in that letter stated:

> "The Section of the Act [402(d)(4)] referred to does not in this case provide a basis for the adjustment for which you have applied since that amendment does not apply to your client who is a seller at retail. For

the same reason, namely, the inapplicability of the statutory provision relied upon, the Office of Price Stabilization does not plan to issue regulations to provide for adjustment of retail prices on the basis you have suggested." (R. 50).

On October 6, 1951, petitioner filed with the court below its reply to respondent's objections to the petition. (R. 42).

On October 9, 1951, the court without extended opinion denied petitioner's petition on the ground that "it is without jurisdiction to grant the relief prayed for." (R. 53).

B.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 408(d) of the Defense Production Act of 1950, as amended.

C.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The Fifth Amendment to the Federal Constitution:

Defense Production Act of 1950, 64 Stat. 798, Public Law 774, 81st Congress, 50 U.S.C.A. App. 2071 *et seq.* as amended by the Defense Production Act Amendments of 1951, 65 Stat. 275, Public Law 96, 82nd Congress, 50 U.S.C.A. App. 2071 *et seq.*; and more particularly Sections 402(d)(4), 407(a), 407(d), 408(a), 408(c), 408(d) and Section 704 of the Defense Production Act of 1950 as amended by the Defense Production Act Amendments of 1951.

D.

QUESTIONS PRESENTED.

1. Whether Section 402(d)(4) of the Act does apply to petitioner which is a seller at retail.

2. If it does, whether the Emergency Court of Appeals had jurisdiction to issue an order directed to the respondent requiring him to take the procedural steps essential to a prompt, fair and impartial administration of the Act, as amended by Section 402(d)(4).

E.

REASONS FOR ALLOWANCE OF THE WRIT.

1. The Clear and Unambiguous Language of Section 402(d) (4) Makes That Section Applicable to "Any Person Subject to a Ceiling Price" Without Limitation and Respondent's Contention That Said Section Does Not Apply to a Seller at Retail Finds No Support in the Statute.

Section 402(d)(4) of the Act makes no distinction between a seller at retail and a seller at a pre-retail level. The section is clear and unambiguous and should have been so construed and administered by the respondent. Rather, in an attempt to avoid administering the section as applied for by the petitioner, respondent arbitrarily and capriciously informed petitioner the section did not provide a basis for adjustment since it does not apply to a seller at retail. In support of his position, he informed the court below the legislative history of the amendment incorporated into the Act as Section 402(d)(4) demontsrated that it was inapplicable to a seller at retail.

This contention is squarely in conflict with the holding of this Court that courts will not resort to legislative history to interpret the meaning of a statute unless the statute on its face contains an ambiguity requiring such resort. *Soon Hing* v. *Crowley*, 113 U.S. 703; *Bird* v. *United States*, 187 U.S. 118; *U. S.* v. *Powers*, 307 U.S. 214; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381. Also see *Schweg-*

mann v. *Calvert Distillers Corporation*, 341 U.S. 384, and Mr. Justice Jackson's concurring opinion therein.

Because the court below, in its consideration of this controversy, obviously gave weight to respondent's contention that the statute was inapplicable to petitioner because of the nature of petitioner's business, this Court should review its judgment.

2. By the Terms of Section 407(a) and Section 704 of the Act Respondent is Required to Make Such Rules, Regulations and Orders as are Necessary or Appropriate to Effectuate the Provisions of the Act. His Refusal to Make Such Rules and Regulations was Arbitrary and Capricious and the Court Below Should Have Taken Jurisdiction to Require Compliance Not Only with the Law But with the Requirements of the Fifth Amendment.

The mere fact that respondent does not like the particular provision of the Act here in controversy, or that he considers it difficult of administration, or that he does not want it to apply to those who sell at retail notwithstanding the clear and unambiguous terms of the section, did not warrant him in arbitrarily and capriciously refusing to administer it or to promulgate procedural regulations for the handling of applications for adjustment filed pursuant to Section 402(d)(4)[1].

---

[1] This Court can take notice of the following facts. Immediately after the amendment of the Act here in controversy became effective the President denounced it as terrible and unworkable and urged Congress to repeal it. Respondent appeared before the Committee on Banking and Currency of the United States Senate on August 30 to urge its repeal. Subsequently, on October 9 and October 10, he appeared before the Committee on Banking and Currency of the United States House of Representatives to urge its repeal or, in lieu of repeal, the enactment of S. 2170 which had previously passed the Senate amending Section 402(d)(4) so as to limit its applicability to the sales of manufacturers or processors of any materials or the charges for industrial services. This Court can also take official notice that by action of the Rules Committee of the House, S. 2170 after having been reported to the House on October 15, 1951, with an amendment was denied a rule for immediate consideration so that no action can be had on it prior to January 1952, if any can be had then.

Section 704 of the Act provides for the making of such rules, regulations and orders as are necessary and appropriate to carry out the provisions of the Act. Section 407(a) of the Act requires the promulgation of regulations providing for protest procedures. The amendment of the Act here in controversy has not been implemented by any procedural regulation setting forth the steps necessary to be taken to obtain consideration of applications for adjustment filed pursuant to the provisions of Section 402(d)(4). Furthermore, respondent has stated that he intends to issue no such regulations to facilitate the processing of applications filed by retailers of whom petitioner is one. Thus, by the simple expedient of ignoring the mandate of the statute, respondent has caused irreparable injury to petitioner and will continue to cause such irreparable injury until and unless he is required by order of court to administer the law in accordance with its plain intent and stated purpose. His refusal to make rules and regulations was arbitrary and capricious and his continued refusal to make such rules and regulations for the processing of such applications for adjustment is arbitrary and capricious, and the court below should have taken jurisdiction to require his compliance with the law and the requirements of the Fifth Amendment. For that reason this Court should review the judgment below.

3. The Emergency Court of Appeals Had Jurisdiction Over the Controversy. Therefore, This Court Should Review its Decision Dismissing Petitioner's Petition for Lack of Jurisdiction.

By the precise terms of the statute, Section 408(d), the court below, and this Court upon review of its judgments and orders, has exclusive jurisdiction to determine the validity of any regulation or order relating to price controls issued under the Act. In the circumstances of this case, no other court could entertain a petition or an appeal or exercise any jurisdiction whatsoever over respondent to re-

quire him properly to administer the law or to grant to this petitioner the equitable relief sought below. *Yakus* v. *U. S.*, 321 U.S. 414. In order to aid the court below in the exercise of its powers, the Act conferred upon it the powers of a district court (Section 408(c) of the Act). Those powers include authority to issue all writs necessary or appropriate in aid of its jurisdiction and agreeable to the usages and principles of law. 28 U.S.C.A. Sec. 1651. Its authority extends to those cases which are within its jurisdiction although no appeal has been taken, because one of the chief functions of mandamus is to remove obstacles to appeal. *Roche* v. *Evaporated Milk Association*, 319 U.S. 21.

As the record herein shows, respondent has taken the flat position that the amendment in controversy does not apply to petitioner, that he will not entertain applications for adjustment filed by a retailer pursuant to the terms of the particular section of the statute involved, and, furthermore, that he will not issue any regulations for the processing of applications for adjustment filed by a retailer pursuant to the provisions of said Section 402(d)(4).

In this controversy the respondent has resorted to the claim of lack of jurisdiction in an effort to deny petitioner the right to have its applications for adjustment considered in the light of the statutory mandate. He contends that the Emergency Court of Appeals is without jurisdiction to require him to act on such applications or to require him to promulgate regulations for the processing of such regulations. The court below apparently agreed with him, notwithstanding the provisions of the statute and more particularly those of Section 408(d) which give to it and this Court upon review of its judgments and orders exclusive jurisdiction "to determine the validity of any regulation or order relating to price controls issued under this title, and of any provision of any such regulation or order."

If, as held by the court below, it is without jurisdiction to require respondent to issue regulations for the administration of the section here in controversy, then petitioner

and others similarly situated are placed in the position of being unable to seek equitable relief from the arbitrary and capricious action of the Director in any other court. *Yakus* v. *U. S., supra.* It is respectfully submitted that this Court should review the decision of the court below to determine this question.

WHEREFORE, your petitioner prays that a writ of certiorari be issued under the seal of this Court directed to the Emergency Court of Appeals to the end that this cause may be reviewed and determined by this Court; that the decree of said court be reversed by this Court, and for such other and further relief as to this Court may seem proper.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1951

No.

SAFEWAY STORES, INCORPORATED, *Petitioner,*

v.

MICHAEL V. DISALLE, Price Director, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURTS OF APPEALS.

I.

PRELIMINARY STATEMENT.

The decision below, the statement of the matter involved and the questions presented appear in the petition for writ of certiorari and in the interest of brevity are incorporated herein by reference.

II.

SUMMARY OF ARGUMENT.

Point 1. Where a statute is clear and unambiguous a court should not resort to legislative history to interpret its meaning. *Soon Hing* v. *Crowley*, 113 U. S. 703; *Bird* v. *United States*, 187 U.S. 118; *U. S.* v. *Powers*, 307 U.S. 214; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381. Also see *Schwegmann* v. *Calvert Distillers Corporation*, 341 U.S. 384, and Mr. Justice Jackson's concurring opinion therein.

Obviously in this case the court below gave weight to the contention of respondent that the legislative history of Section 402(d)(4) showed that while Congress spoke in clear and unambiguous terms it intended a meaning other than that it stated. The statute applies to any person subject to a ceiling price and without limitation. The court below erred when it did not so hold, and this Court should review its judgment.

Point 2. By the terms of Sections 407(a) and 704 of the Act, respondent is required to make such rules, regulations and orders as are necessary or appropriate to effectuate the provisions of the Act. His refusal to make such rules and regulations is arbitrary and capricious and serves to defeat the right of this petitioner to perfect an appeal in the manner prescribed by the statute. This arbitrary and capricious action violates petitioner's rights under the Fifth Amendment and the court below should have so held.

Point 3. The statute vests the court below and this Court upon review of its judgments and orders with exclusive jurisdiction to determine the validity of any regulation or order relating to price controls issued under the Act. In the circumstances of this case no other court could entertain a petition or an appeal or exercise any jurisdiction whatsoever over respondent to require him properly to administer the law. *Yakus* v. *U. S.*, 321 U.S. 414. The court below is vested with the powers of a district court, including the authority to issue all writs necessary or appropriate in aid of its jurisdiction. This authority extends to those cases within its jurisdiction, although no appeal has been taken because one of the chief functions of mandamus is to remove obstacles of an appeal such as have been created by respondent herein. *Roche* v. *Evaporated Milk Association*, 319 U.S. 21. Furthermore, the decision of the court below conflicts with its decision in *Safeway Stores, Inc.* v. *Brown*, 138 F. 2d 278, cert. denied 320 U.S. 797. For these reasons this Court should review the judgment below.

III.

ARGUMENT.

Point 1.

Section 402(d) (4) of the Act Applies to All Persons Subject to Price Ceilings. The Clear and Unambiguous Language of Section 402(d) (4) of the Act Makes That Section Applicable to "Any Person Subject to a Ceiling Price" Without Limitation. Respondent's Contention That Said Section Does Not Apply to a Seller at Retail Finds No Support in the Statute.

Respondent's contention below that Section 402(d)(4) of the Act does not apply to petitioner because petitioner is exclusively engaged in sales at retail cannot be supported by the statute. Section 402(d)(4) is applicable to "any person subject to a ceiling price" without limitation. Therefore, resort should not be had to legislative history in an effort to give to a statute a meaning other than that stated therein. *Soon Hing* v. *Crowley*, 113 U. S. 703; *Bird* v. *United States*, 187 U. S. 118; *U. S.* v. *Powers*, 307 U. S. 214; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381. Also see *Schwegmann* v. *Calvert Distillers Corporation*, 341 U. S. 384, and Mr. Justice Jackson's concurring opinion therein. Because the court below in its consideration obviously gave weight to respondent's contention that the statute was inapplicable to petitioner because of the nature of petitioner's business, this Court should review its judgment.

Point 2.

By the Terms of Sections 407(a) and 704 of the Act, Respondent is Required to Make Such Rules, Regulations and Orders as are Necessary or Appropriate to Effectuate the Provisions of the Act. His Refusal to Make Such Rules and Regulations was Arbitrary and Capricious and Served to Defeat the Right of This Petitioner to Perfect an Appeal in the Manner Prescribed by the Statute.

Dislike for a statute does not warrant an administrative agent or agency in ignoring the terms thereof. The record in this case shows that notwithstanding the terms of Section 402(d)(4) respondent has taken the position that it does not apply to petitioner. He has further stated that he intends to make no rules or regulations providing for the processing of applications such as those filed by petitioner. (R. 50).

By the terms of Sections 407(a) and 704 of the Act, respondent is required to make such rules, regulations and orders as are necessary or appropriate to effectuate the provisions of the Act. A reading of the statute demonstrates that in the absence of such rules and regulations providing for the processing of applications for adjustment a preliminary step requisite to the appellate procedure cannot be taken. To illustrate:

Section 407(a) provides for the filing of protests against regulations or orders relating to price controls and such protests must be filed "in accordance with regulations to be prescribed by the President", and each such protest must specifically set forth objections and be accompanied by affidavits or other written evidence in support of the objections.

Section 407(d) requires that a protest shall be granted or denied, or granted in part and the remainder denied within a reasonable time after it is filed.

Section 408(a) provides that any person who is aggrieved by the denial or partial denial of his protest may file a complaint with the Emergency Court of Appeals and that upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation or order in whole or in part, to dismiss the complaint, or to remand the proceeding.

The Emergency Court of Appeals, and this Court upon review of its judgments and orders, are by the terms of Section 408(d) vested with "exclusive jurisdiction to determine the validity of any regulation or order relating to price controls issued under this title, and of any provision of any such regulation or order."

This court should bear in mind the fact that the amendments to the Act became effective on August 1, and between that time and October 24 (the date of the preparation of this Petition and Brief) respondent had not issued any regulations for the processing of any applications filed pursuant to Section 402(d)(4). He hadn't even issued regulations for the processing of applications of applicants who he admits are entitled to the benefit of the statute. Thus, by his dilatory tactics and his disregard of the mandate of the law, respondent has made it impossible for those subject to the law to proceed thereunder. These facts were called to the attention of the court below when petitioner requested it to issue a mandatory order requiring respondent to issue rules and regulations for the processing of applications for adjustment. The decision of the court below that it was without jurisdiction deprives petitioner of its rights as provided in the Fifth Amendment to the Constitution of the United States and should be reviewed by this Court.

Point 3.

The Emergency Court of Appeals had Jurisdiction Over the Controversy. Therefore, This Court Should Review its Order Dismissing Petitioner's Petition for Lack of Jurisdiction.

In the circumstances of this case no court other than the Emergency Court of Appeals could in the first instance entertain a petition or an appeal, or exercise any jurisdiction whatsoever over respondent to require him properly to to administer the law. *Yakus* v. *U. S.*, 321 U. S. 414.

The Emergency Court of Appeals is vested with the powers of a district court with respect to the jurisdiction conferred upon it (Section 408(c) of the Act). These powers include the authority to issue all writs necessary or appropriate in aid of its jurisdiction.

As held by this Court, this authority extends to those cases within its jurisdiction where an appeal has not been taken because one of the chief functions of mandamus is to remove obstacles of an appeal such as have been created by respondent herein. *Roche* v. *Evaporated Milk Association*, 319 U. S. 21.

All that petitioner requested of the court below was that it issue an order directing respondent to act as the statute requires him to act. Petitioner did not ask that the respondent be required to include specific terms in his regulations, but solely that he be required to issue regulations in order that the terms of the statute might be complied with.

As was stated by the court below in *Safeway Stores, Inc.* v. *Brown*, 138 F. 2d 278:

> "Under such circumstances mandamus will lie where an inferior tribunal or agency refuses to act even though the Act required involves the exercise of judgment and discretion. * * * Of course, in such a case the decree of the court would merely require the administrator to exercise his discretionary power * * * with-

out any direction as to the manner in which his discretion should be exercised."

Therefore, because the decision of the court below conflicts with its own decision in *Safeway* v. *Brown,* and with the decision of this Court in *Roche* v. *Evaporated Milk Association, supra,* this Court should review the judgment below.

CONCLUSION.

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 408

SAFEWAY STORES INCORPORATED, *Petitioner*

v.

MICHAEL V. DISALLE,
Director of Price Stabilization

On Petition for a Writ of Certiorari to the Emergency Court of Appeals

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The order of the Emergency Court of Appeals (R. 53) denying the petition for lack of jurisdiction was not accompanied by an opinion.

JURISDICTION

The order of the Emergency Court of Appeals was entered on October 9, 1951 (R. 53). The peti-

tion for a writ of certiorari was filed on November 1, 1951. The jurisdiction of this Court is invoked under Sec. 408(d) of the Defense Production Act of 1950 (64 Stat. 808, 50 U.S.C. App., Supp. IV, 2108(d)) and 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether the Emergency Court of Appeals has jurisdiction to issue a mandatory order to direct the performance of an act which already has been performed.

2. Whether the Emergency Court of Appeals has jurisdiction under the All-Writs Statute, 28 U.S.C. 1651, to order the issuance of procedural regulations to govern applications which may be filed in the future with the Director of Price Stabilization.

STATUTES INVOLVED

The provisions of the Defense Production Act of 1950 (64 Stat. 798, 50 U.S.C. App., Supp. IV, 2061, et seq.) as amended by the Defense Production Act Amendment of 1951, approved July 31, 1951 (c. 275, Public Law 96, 82nd Congress, 1st Sess.) are set forth in pertinent part, *infra,* pp. 13-19.

STATEMENT

Petitioner, an operator of retail food stores (R. 7), seeks review of an order of the Emergency Court of Appeals denying for lack of jurisdiction its petition for an order commanding respondent (a) forthwith to grant or deny certain pending ap-

plications filed by petitioner with respondent, and (b) to issue procedural regulations providing for the expeditious processing of similar applications which may be filed in the future (R. 6).

1. *The Statutory Background.* Acting under Secs. 703 and 704 of the Defense Production Act of 1950[1] (64 Stat. 816, 50 U.S.C. App., Supp. IV, 2153, 2154, *infra,* p. 19), respondent,[2] on March 28, 1951, issued Ceiling Price Regulation 15 (hereinafter referred to as CPR 15) which covers retail stores of the type operated by petitioner[3] (16 F.R. 2735) (Pet. 2).

On July 31, 1951, the President approved the Defense Production Act Amendment of 1951 which added to Sec. 402 of the Act (64 Stat. 803, 50 U.S.C. App., Supp. IV, 2102) paragraphs 402 (d) (4) (the Capehart Amendment, *infra,* pp. 13-14) and 402(k) (the Herlong Amendment, *infra,* pp. 14-15). The amendments are concerned with the adjustment of ceiling prices to rising costs and with the maintenance of customary profit margins.[4]

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[1] 64 Stat. 798, 50 U. S. C. App., Supp. IV, 2061, hereafter referred to as the Act.

[2] The authority to issue this and other Regulations under the Act was delegated to respondent by Executive Order 10161, Part IV, Sec. 401(c) (15 F. R. 6105) and Economic Stabilization Agency General Order No. 2, Sec. 1(c) (16 F. R. 738).

[3] CPR 15 became effective April 5, 1951 (CPR 15, following Sec. 39(b)).

[4] Petitioner's contention is that the Capehart Amendment, phrased in very general language, is applicable to retailers. It is respondent's position that retailers are covered expressly and exclusively by the Herlong Amendment. The legislative

2. *The Proceedings Below.* On August 24, 1951 (R. 24), petitioner filed with the Office of Price Stabilization an application in which it requested the adjustment of the ceiling prices of its stores located in the Seattle, Washington, area pursuant to Sec. 402(d)(4) (the Capehart Amendment) or, in the alternative, an amendment of CPR 15 by the issuance of a Supplemental Regulation which would "fulfill the intent of Congress as expressed in Section 402(k)" (the Herlong Amendment) (R. 7, 11, 14). An amendment to this application was filed on September 7, 1951 (R. 21). Petitioner submitted twenty-one additional applications between August 28, 1951, and September 13, 1951 (R. 4).[5]

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history of the Defense Production Act Amendment of 1951 and of the proposed amendment of the Capehart Amendment (S. 2170) (R. 34-37) tend to support respondent's position that, since retailers are covered by the Herlong Amendment, they do not come under the Capehart Amendment. See also H. Rep. No. 1186, 82nd Cong., 1st Sess., pp. 4-5: "Sec. 402(d)(4) developed as a manufacturers' provision. Its pricing formulas are not applicable to all types of sellers. Wholesalers and retailers are covered in section 402(k). S. 2170 expressly makes the provision applicable to the sales of manufacturers, processors, and sellers of industrial services."

The overlap of the two Amendments and the ensuing ambiguity as to whether they are cumulative or mutually exclusive, render imperative the recourse to legislative history. *United States* v. *Dickerson*, 310 U. S. 554, 562; *United States* v. *Fisher*, 2 Cranch 358, 386.

[5] These 22 applications covered about one-half of petitioner's stores and one-tenth of the items covered by CPR 15 (R. 4). Three applications apparently were filed between September 13 and 24, 1951 (R. 50).

On September 17, 1951, petitioner filed with the Emergency Court of Appeals a petition (R. 1) asking for a writ commanding respondent (a) forthwith to grant or deny the pending applications for adjustment and (b) to issue procedural regulations providing administrative machinery for the expeditious processing of similar applications for adjustment which may be filed in the future (R. 6).

Respondent denied the applications on October 2, 1951 (R. 50)[6] on the grounds that the Capehart Amendment did not apply to sellers at retail (R. 50) and that the Herlong Amendment by its very terms operated only prospectively and did not require the revision of existing rules, regulations or orders (R. 51).[7] The Emergency Court of Appeals dismissed the petition on October 9, 1951, for lack of jurisdiction (R. 53).

On October 29, 1951, petitioner filed with respondent a protest against the order denying its applications. That protest was denied on November 29, 1951. This petition for a writ of certiorari was filed on November 1, 1951.

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[6] This order also disposed of the three applications filed between September 17 and September 24, 1951 (cf. R. 50).

[7] Respondent did not refer, in his objection to the petition (R. 26-40), to this denial of petitioner's application since the objections had to be filed by October 2, 1951 (R. 41), and respondent was not certain whether the denial of the application would be ready by that day. Petitioner, however, brought the denial of the application to the attention of the Emergency Court of Appeals (R. 42, 50-52).

ARGUMENT

Petitioner seeks a mandatory order directing respondent to do two things: (a) to grant or deny petitioner's pending applications for the adjustment of retail price ceilings, and (b) to issue procedural regulations for the expeditious handling of similar applications for adjustment which may be filed in the future (R. 6). It will be noted that petitioner does not ask for relief with respect to its alternative request for the issuance of an amendment of C.P.R. 15 pursuant to the Herlong Amendment (cf. p. 4, ***supra***).

1. Petitioner asks for an order directing respondent to grant or deny its pending applications for adjustment. Respondent issued such order on October 2, 1951 (*supra,* p. 5). This action left nothing to litigate as far as this branch of the petition is concerned. The act applied for was done and the controversy between the parties became moot *pro tanto.* No further proceedings could be had on this request of the petition and the petition was *pro tanto* properly denied for lack of jurisdiction. *Brownlow* v. *Schwartz,* 261 U. S. 216.

2. The second branch of the petition requests an order "to issue procedural regulations providing administrative machinery for the expeditious processing of similar applications for adjustment which may be filed in the future" (R. 6).

We submit that the Emergency Court of Appeals

properly held that it lacked jurisdiction to issue such order because: (a) the All Writs Statute, 28 U.S.C. 1651, on which petitioners rely, does not authorize such relief in respect of administrative proceedings which have never been and may never be filed; (b) the absence of the requested regulation has not impaired petitioner's recourse to the courts; and (c) petitioner actually asks for a peremptory writ of mandamus which is beyond the jurisdiction of the federal courts.

a. Petitioner invokes the jurisdiction of the Emergency Court of Appeals under 28 U.S.C. 1651, the All Writs Statute. (Pet. 9, 16). We submit that there are serious doubts as to whether 28 U.S.C. 1651 confers upon the federal courts a jurisdiction as extended as claimed by petitioner; in any event, in view of the facts of the case, there is no occasion for exercising it.

Basically, 28 U.S.C. 1651 grants to the federal courts the power to "issue all writs necessary or appropriate in aid of their respective jurisdictions." Recent decisions of this Court indicate that, without regard to already existing jurisdiction, an appellate court may issue mandamus to correct action by an inferior federal court obstructing the right to appeal.[8] It should be noted,

[8] *Roche* v. *Evaporated Milk Ass'n*, 319 U. S. 21, 25, and authorities cited; *United States* v. *District Court*, 334 U. S. 258, 263; cf. *McIntire v. Wood*, 7 Cranch 504, 507; *County of Greene* v. *Daniel*, 102 U. S. 187, 195.

however, that the instances in which that power to remove obstacles to review has been exercised involve lower federal courts. It may be doubted whether this jurisdiction applies also to cases pending in administrative agencies. The question whether courts which have ultimate review over administrative determinations should inject their mandates into pending administrative proceedings raises serious practical considerations in view of the inherent differences between judicial and administrative procedures. Cf. *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375, 383; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 141.[9]

Moreover, petitioner has asked the Emergency Court of Appeals to exercise its powers under the All Writs Statute with respect to adjustment proceedings which have not even been filed as yet. It prays for a writ compelling issuance of regulations for the expeditious processing of "applications for adjustment which may be filed in the future". (R. 6.) We cannot perceive how the holdings in *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, and *United States* v. *District Court*, 334 U. S. 258, concerned with proceedings pending in inferior federal courts, can be stretched to confer power upon

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[9] These considerations apply with special force to adjustment proceedings under the Defense Production Act. See R. 29-31.

the Emergency Court of Appeals to direct an administrative agency to issue regulations to govern applications which have not been and may never be filed with the agency.[10]

b. Petitioner also asserts that the absence of these regulations constitutes an obstacle to judicial review (Pet. 9, 16). The facts indicate that these fears are unfounded. Petitioner's applications for adjustment—including several filed after its petition had been submitted to the Emergency Court of Appeals (*supra,* p. 4, fn. 5)—have been passed upon by respondent. It has filed a protest from the denial of its applications, which has been denied (*supra,* p. 5). Thus, the door to judicial review is open to it. Sec. 408 of the Act (64 Stat. 808, 50 U.S.C. App., Supp. IV, 2108, *infra,* pp. 16-19). These denials of the applications and of the protest were based solely on the legal ground that, as a retailer, petitioner is not entitled to the adjustments under the Capehart Amendment. In any event, petitioner makes no showing that its ability to present any data or arguments supporting the requested adjustment was impaired by the lack of detailed regulations implementing the Capehart Amendment. Still less is there anything to indi-

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[10] *Safeway Stores* v. *Brown,* 138 F. 2d 278 (E. C. A.), certiorari denied 320 U. S. 797 (cf. Pet. 12, 16, 17) was concerned with a pending protest, not with adjustment applications which might be filed in the future.

cate that its right to judicial review has been impaired in any way by the absence of the requested regulations.

c. Petitioner pays lip service to the proposition that it is seeking this relief under the ancillary powers of the courts to issue mandatory orders to remove obstacles to appeal (Pet. 9). Actually, its argument is to the effect that respondent is under a duty to issue those regulations and that petitioner is suffering irreparable loss by respondent's failure to conform with his duty (R. 5; Pet. 8, 14-15). Thus, petitioner in effect asks for the issuance of an original writ of mandamus. It is well settled that the federal courts lack jurisdiction to issue this writ. (*Covington Bridge Co.* v. *Hager,* 203 U. S. 109, 110; *Knapp* v. *Lake Shore Ry. Co.,* 197 U. S. 536). Moreover, the issuance of the orders requested *pendente lite* or in an ancillary proceeding conflicts with Sec. 408(c) of the Act (64 Stat. 808, 50 U.S.C. App., Supp. IV, 2108(a), *infra,* p. 17) providing that the Emergency Court of Appeals "shall not have power to issue any temporary restraining order or interlocutory decree staying, in whole or in part, the effectiveness of any regulation or order relating to price controls issued under this title." The spirit, if not the words, of this provision applies with equal force to mandatory orders as it does to prohibitory injunctions.

On the merits, petitioner claims that respondent has failed to comply with his statutory duties under Secs. 407(a) and 704 of the Act (64 Stat. 807, 816, 50 U.S.C. App., Supp. IV, 2107, 2154, *infra*, pp. 15, 19) to issue the necessary implementary regulations. Sec. 407(a) provides that a protest is to be filed "in accordance with regulations to be prescribed by the President" (cf. Pet. 14). Comprehensive regulations governing the protest procedure are contained in Price Procedural Regulation 1, Secs. 30-61, originally issued in December 1950.[11]

Pursuant to Sec. 704 of the Act "the President *may* make such rules, regulations, and orders as he deems necessary or appropriate to carry out the provisions" of the Act (cf. Pet. 8). The very terms of the statute indicate that this section merely confers on the President or his delegate (cf. Sec. 703 of the Act, 64 Stat. 816, 50 U.S.C. App., Supp. IV, 2153) a discretionary authority, not a peremptory duty, the compliance with which could be compelled by mandamus. Cf. *Decatur* v. *Paulding*, 14 Pet. 497.

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[11] Price Procedural Regulation 1 (P. P. R. 1) was originally issued effective December 18, 1950. (32A C. F. R., Ch. II, 15 F. R. 9055.) It has been revised effective May 26, 1951, 16 F. R. 4974.

CONCLUSION

The decision below is correct; there is no conflict of decisions. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

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DECEMBER, 1951.

APPENDIX

The Defense Production Act of 1950 (64 Stat. 798, 50 U.S.C. App., Supp. IV, 2061, et seq.), as amended by the Defense Production Act Amendments of 1951, approved July 31, 1951 (82nd Cong., 1st Sess., c. 275, Public Law 96) provides in pertinent part:

Sec. 402. * * * * * *

(d) (4) After the enactment of this paragraph no ceiling price on any material (other than an agricultural commodity) or on any service shall become effective which is below the lower of (A) the price prevailing just before the date of issuance of the regulation or order establishing such ceiling price, or (B) the price prevailing during the period January 25, 1951, to February 24, 1951, inclusive. Nothing in this paragraph shall prohibit the establishment or maintenance of a ceiling price with respect to any material (other than an agricultural commodity) or service which (1) is based upon the highest price between January 1, 1950, and June 24, 1950, inclusive, if such ceiling price reflects adjustments for increases or decreases in costs occurring subsequent to the date on which such highest price was received and prior to July 26, 1951, or (2) is established under a regulation issued prior to the enactment of this paragraph. Upon application and a proper showing of his prices and costs by any person subject to a ceiling

price, the President shall adjust such ceiling price in the manner prescribed in clause (1) of the preceding sentence. For the purposes of this paragraph the term "costs" includes material, indirect and direct labor, factory, selling, advertising, office, and all other production, distribution, transportation and administration costs, except such as the President may determine to be unreasonable and excessive.

* * * * *

(k) No rule, regulation, order or amendment thereto shall hereafter be issued under this title, which shall deny to sellers of materials at retail or wholesale their customary percentage margins over costs of the materials during the period May 24, 1950, to June 24, 1950, or on such other nearest representative date determined under section 402(c), as shown by their records during such period, except as to any one specific item of a line of material sold by such sellers which is in short supply as evidenced by specific government action to encourage production of the item in question. No such exception shall reduce such customary margins of sellers at retail or wholesale beyond the amount found by the President, in writing, to be generally equitable and proportionate in relation to the general reductions in the customary margins of all

other classes of persons concerned in the production and distribution of the excepted item of material.

* * * * *

Sec. 407. (a) At any time within six months after the effective date of any regulation or order relating to price controls under this title, or, in the case of new grounds arising after the effective date of any such regulation or order relating to price controls, within six months after such new grounds arise, any person subject to any provision of such regulation or order may, in accordance with regulations to be prescribed by the President, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. Statements in support of any such regulation or order may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the President. Within a reasonable time after the filing of any protest under this section, but in no event more than thirty days after such filing, the President shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the President denies any such pro-

test in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the President has taken official notice.

* * * * *

(d) Any protest filed under this section shall be granted or denied by the President, or granted in part and the remainder of it denied within a reasonable time after it is filed. Any protestant who is aggrieved by undue delay on the part of the President in disposing of his protest may petition the Emergency Court of Appeals for relief; and such court shall have jurisdiction by appropriate order to require the President to dispose of such protest within such time as may be fixed by the court. If the President does not act finally within the time fixed by the court, the protest shall be deemed to be denied at the expiration of that period.

Sec. 408 (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals specifying his objections and praying that the regulation or order protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the President, who shall certify and file with such court a transcript of such portions of the

proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the President has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation or order, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided,* That the regulation or order may be modified or rescinded by the President at any time notwithstanding the pendency of such complaint. * * *

* * * * *

(c) The Emergency Court of Appeals is hereby continued for the purpose of the exercise of the jurisdiction granted by this title, with the powers herein specified, together with the powers heretofore granted by law to such court which are not inconsistent with the provisions of this title. The court shall have the powers of a district court with respect to the jurisdiction conferred on it by this title; except that the court shall not have power to issue any temporary restraining order or interlocutory decree staying or restraining, in whole or in part, the effectiveness of any regulation or order relating to price controls issued under this title. The court shall exercise its powers and prescribe rules governing its pro-

cedure in such manner as to expedite the determination of cases of which it has jurisdiction under this title.

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a United States court of appeals as provided in section 1254 of title 28, United States Code. The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order relating to price controls issued under this title, and of any provision of any such regulation or order. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation or order relating to price controls, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this title authorizing the issuance of such regula-

tions or orders, or any provision of any such regulation or order, or to restrain or enjoin the enforcement of any such provision.

Sec. 703. (a) Except as otherwise specifically provided, the President may delegate any power or authority conferred upon him by this Act to any officer or agency of the Government, including any new agency or agencies (and the President is hereby authorized to create such new agencies, other than corporate agencies, as he deems necessary), and he may authorize such redelegations by that officer or agency as the President may deem appropriate. * * *

* * * * *

Sec. 704. The President may make such rules, regulations, and orders as he deems necessary or appropriate to carry out the provisions of this Act. Any regulation or order under this Act may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions as in the judgment of the President are necessary or proper to effectuate the purposes of this Act, or to prevent circumvention or evasion, or to facilitate enforcement of this Act, or any rule, regulation, or order issued under this Act. * * *

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